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EXAMINER

ROBERTS, LEZAH

ART UNIT

PAPER NUMBER

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NOTIFICATION DATE

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ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ALESSANDRO LUIGI SPADINI, MELISSA IVA KATZ,
DAVID ROBERT WILLIAMS, MARCINA SICILIANO,
EVAN HILLMAN, ANDRE PULEO, and MEGAN KATHLEEN HURLEY

Appeal 2010-004813
Application 10/730,709
Technology Center 1600

Before DONALD E. ADAMS, MELANIE L. McCOLLUM, and
STEPHEN WALSH, *Administrative Patent Judges*.

WALSH, *Administrative Patent Judge*.

DECISION ON REQUEST FOR RECONSIDERATION¹

Appellants request reconsideration of the Decision on Appeal entered July 26, 2010, which affirmed obviousness rejections of all the pending claims.

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appellants' invention is a skin care or cleansing product having certain compositions in separate chambers, including two reactive components in an anhydrous carrier in the first chamber. The rejection we affirmed concluded that the invention defined in claim 1 would have been obvious over the combined teachings of the Lentini, Farrell, and Guilbeaux references.

Appellants request rehearing on the ground that the Board misapprehended or overlooked Appellants' argument that Farrell taught away from suspending dry ingredients in the anhydrous carrier of claim 1(c). (Request 2.) According to Appellants, "Farrell discourages the use of suspending reactive materials in an anhydrous medium as would be apparent to the skilled person reading Farrell and its teaching of copious lather and finely divided particles in intimate contact with each other." (Request 3.)

Briefly, the rejection we affirmed was based on findings that Lentini disclosed self-foaming cleansing systems that comprised anhydrous bicarbonate and anhydrous acid dispensed from a package with chambers, and "Farrell et al. disclose[d] skin [cleansing] compositions comprising an intimate mixture of an acid such as citric acid and an alkaline material such as sodium bicarbonate." (Ans. 4.) Notwithstanding Farrell's disclosure of "an intimate mixture" that Appellants point to, the Examiner concluded that it would have been obvious to a person of ordinary skill in the art "to combine the bicarbonate and acid in the same chamber when in an anhydrous composition of Lentini et al. because it has been disclosed in the art that the two components do not react in a dry state and the two components have been disclosed by the art in combination in anhydrous skin

care compositions, as supported by Farrell et al.” (*Id.* at 6.) We agreed with the Examiner. (Decision 6-7.)

We considered Appellants’ argument that Farrell taught away, but were not persuaded. (*Id.*) On reconsideration, we remain unpersuaded.

First, Appellants’ argument about Farrell’s intent to produce “copious lather” does not weigh heavily for Appellants’ claims, which do not require copious lather production. In this case, combined teachings of the prior art suggested the cleansing product defined in the claims. Appellants do not assert that a practical cleansing product would not have resulted from combining the prior art teachings. “Obviousness does not require absolute predictability of success. . . . [A]ll that is required is a reasonable expectation of success.” *In re O’Farrell*, 853 F.2d 894, 903-04 (Fed. Cir. 1988).

Second, assuming, for the sake of argument, that a person of ordinary skill in the art would have expected the product suggested by the references would produce less than copious lather, that would not make it an unobvious cleansing product. The Decision noted that Farrell included materials likely to reduce the intimacy of ingredient contact. (*Id.* at 6.) Appellants themselves note that Farrell’s examples show greater than 70% active ingredients (Request 2), acknowledging that some amount of contact-reducing ingredients was taught by Farrell itself. Applying the law of obviousness to the facts here, the Examiner was not required to find that the cleansing product suggested by the prior art would equal or better the prior art products in lather production. *See In re Fulton*, 391 F.3d 1195, 1200 (Fed. Cir. 2004) (“a finding that the prior art as a whole suggests the desirability of a particular combination need not be supported by a finding

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that the prior art suggests that the combination claimed by the patent applicant is the preferred, or most desirable, combination”).

SUMMARY

We deny the requested relief.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

DENIED

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